Supreme Court, U.S.
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In the Supreme Court of the United States

IN RE RYAN EDWARD BENNETT, DECEASED,
AND
KRISTI S. BENNETT,

Petitioner,

v.

MARC E. BENNETT, ROBERT L. STEENROD JR,
SPECIAL ADMINISTRATOR OF THE ESTATE OF
RYAN EDWARD BENNETT, DECEASED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

THEODORE COATES, ESQ.
LAW OFFICES OF THEODORE COATES, P.C.
7887 EAST BELLEVIEW AVENUE SUITE 1100
ENGLEWOOD, COLORADO 80111
(303) 738-9600

Counsel for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

Question Presented

Whether the lower courts in this case exceeded their jurisdictional authority when they adjudicated a time barred, nonjusticiable dispute based on the recommendations and actions of two state officials acting in this case and whether such adjudication caused an impermissible violation of substantive and procedural due process of law and denial of the equal protection of the law guaranteed to Petitioner in these circumstances under the 14th Amendment.

List of Parties and Corporate Disclosure

Pursuant to Sup. Ct. R. 14.1(b), the Parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Petitioner Kristi S. Bennett

2. Respondents Marc E. Bennett and Robert L. Steenrod, Jr., Special Administrator of the estate of Ryan Edward Bennett, deceased.

Corporate Disclosure Pursuant to Sup. Ct. R. 29.6

None of the Parties to the proceeding are corporate entities.

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I. Citations to Opinions and Orders

A Colorado Court of Appeals Judgment and Decision dated January 26, 2006, review of which is sought here, and a May 8, 2006 Order of the Supreme Court of the State of Colorado denying a Writ of Certiorari to the Colorado Court of Appeals can both be located in Appendix A to this Petition.

II. Basis for Jurisdiction

This Petition for Writ of Certiorari (herein "Petition") seeks review of a Colorado State Court of Appeals decision and judgment dated January 26, 2006 affirming an order of the Denver Probate Court issued on July 24, 2003 which July 24, 2003 order of the Denver Probate Court was issued 68 days after the Denver Probate Court's subject matter jurisdiction had expired.

The Supreme Court has jurisdiction to review the Colorado Court of Appeals order, decision and judgment of January 26, 2006, on a writ of certiorari pursuant to 28 U.S.C. 2101(c).

III. Statutory Provisions at Issue

The following statutory provisions are involved in this case: The text of any relevant provisions of Colorado state law are recited in the orders and decisions made part of Appendix A hereto.

IV. Statement of the Case

A. Jurisdiction in the First Instance

Since 1986 and pursuant to C.R.S. 15-10-302 the Denver Probate Court had subject matter jurisdiction over

the Conservatorship for the benefit of protected person and minor child Ryan E. Bennett. The Denver Probate Court also had jurisdiction beginning in October of 2002 over the protected person's probate estate, The Estate of Ryan E. Bennett, deceased. Ryan E. Bennett, the minor child and protected person, died November 2, 2001.

B. Factual Background and Procedural History

As described more fully in the January 26, 2006 Decision of the Colorado Court of Appeals, reprinted in its entirety in Appendix A of this Petition, after a bench trial on February 25, 2003, the trial court (the Denver Probate Court) entered an order and judgment in certain conservatorship proceedings that been initiated by Mr. Bennett in August 2001. Marc E. Bennett, Respondent here and decedent's probate estate beneficiary below, filed a post-trial motion on March 18, 2003 under C.R.C.P. 59 in relation to the conservatorship trial which ended February 25, 2003.

At the conservatorship trial held on February 25, 2003 the parties (Marc E. Bennett and Petitioner) litigated certain conservatorship accounting and other issues joined for litigation by the filing of papers by Mr. Bennett in August 2001 against Mrs. Bennett, Petitioner here, who was sole conservator of the conservatorship for the benefit of her son, Ryan E. Bennett.

Colorado law and applicable post-trial rules of civil procedure permit a trial litigant, such as Respondent Marc E. Bennett, following trial, to move the trial court to alter, amend or modify its trial judgment. A proposed alteration or modification of a trial judgment can be procedurally accomplished by movant filing a timely request for such relief in a post-trial motion requesting the court to alter, modify or amend a trial judgment, subject to further sub-rules set out in C.R.C.P. 59.

Respondent Marc E. Bennett filed a Rule 59 motion and, as allowed under such rule, combined with it a Rule 57 motion requesting a declaratory judgment with respect to his rights, if any, to receive, as a survivor, one-half of the proceeds of an annuity insurance contract (the primary annuitant being Ryan E. Bennett, protected person). The beneficiary clause in the annuity policy named "the legal representative" of Ryan Bennett as the first alternate beneficiary of the annuity in the event of Ryan Bennett's death. Petitioner did *not* file a post-trial motion as stated in the January 26, 2006 decision of the Colorado Court of Appeals.

Ten days prior to his filing on March 18, 2003 of his post-trial combined motions, i.e., a few days after the February 25, 2003 trial had concluded, Petitioner had filed, on March 8, 2003, a Rule 60 motion. A Rule 60 motion is not, by definition under the Colorado Rules of Civil Procedure, a post-trial motion. Post-trial motions are defined in and are governed under Rule 59, not in Rule 60. Besides that fact and legal status of Petitioner's Rule 60 motion, Petitioner's motion was filed for an entirely different purpose than the purpose for which Mr. Bennett separately filed, on March 18, 2003, his combined post-trial motions.

Mr. Bennett in his post-trial combined motions sought to alter or amend the February 25, 2003 conservatorship trial judgment. Mrs. Bennett did not, in her March 8, 2003 Rule 60 motion, seek to amend or alter the conservatorship trial results. Mrs. Bennett's defenses had prevailed at trial due to a failure of proof on the contentions raised by Mr. Bennett about certain alleged self dealings and his objections to Petitioner's accountings previously filed with the probate court by her as conservator, all as raised in the August 2001 filing by Mr. Bennett which led to the February 25, 2003 trial. Mrs. Bennett's Rule 60 motion of March 8, 2003 merely attempted to correct an error in the

findings contained in the trial judgment of February 25, 2003 and had nothing whatever to do with beneficial rights to the insurance annuity proceeds or who owned them.

The Court of Appeals analysis set out in full in Appendix A assumed that the same party filed a Rule 60 motion as filed the post-trial motion, which was not true in this case. The case cited in the court's analysis, *De Avila v. Estate of DeHerrera*, 75 P.3d 1144 (Colo. App. 2003), had nothing at all to do with combined Rule 57/Rule 59 post-trial motions in any event and involved a fact situation where the same party after trial filed both a Rule 60 seeking to correct a factual error in the findings contained in the trial judgment and *the same party* filed a post-trial motion under Rule 59.

Mr. Bennett was the movant as to *his* combined post-trial motions, not Mrs. Bennett. In addition to seeking a declaration from the court as part of the conservatorship trial judgment that he was entitled to a beneficial interest in one-half of the proceeds payable at death under the annuity contract, Mr. Bennett further sought a declaration that the subject annuity was a probate asset. Mr. Bennett and Mrs. Bennett had previously (in November 2002) been declared 50-50 beneficiaries of whatever *probate* assets were ultimately determined to be properly includable in the decedent's probate estate.

As noted above the Conservatorship for the benefit of Ryan E. Bennett had been in existence since 1986. Petitioner has been conservator since 1986 in the conservatorship proceedings for her son, Ryan E. Bennett. Mr. Bennett nominally served as co-conservator with Mrs. Bennett, the Petitioner, between 1986 and 1993 when he (Marc Bennett) was then removed as fiduciary, leaving him after that in the legal status of an 'interested person' entitled to notices of proceedings and little else.

Marc E Bennett had sadly abandoned the protected person and his responsibilities as Ryan's father soon after the protected person was born in 1982 even owing unpaid child support at the time of Ryan Bennett's death November 2, 2001. Mr. Bennett had left the state of Colorado by the year 2000 having moved to Florida, further abandoning his responsibilities to the Colorado courts (in respect to child support obligations), to the conservatorship and to the protected person. Marc Bennett and Kristi Bennett, the Petitioner, had been divorced since 1988. As noted in facts recited in Appendix A Ryan Bennett was a developmentally disabled child from birth. Petitioner was sole legal guardian, daily caregiver to Ryan Bennett from 1982 until his death in November 2001, sole conservator of the conservatorship and sole legal representative at the time of Ryan's death.

In Colorado CRCP 59(j) and 59(k) require that the trial judge must act on a post-trial combined motion, such as the kind filed by the father, Respondent Marc Bennett in this case, *within 60 days after the post-trial combined motion is filed.* If the court does not timely act within that 60 day window of time all relief requested in such post-trial motions is "deemed denied for all purposes" including for purposes of the 45 day Notice of Appeal filing requirement set forth in Rule 59(k).

The relief sought in the combined post-trial motions filed by Respondent Marc Bennett, was, by operation of law, deemed denied on May 17, 2003, 60 days after the post-trial motions were determined by other probate court order in April 2003 to be timely filed and properly before the court for resolution. Under Colorado law any order entered more than 60 days after a post-trial motion is filed is a void order because at the time of its issuance the court lacks subject matter jurisdiction. *Driscoll v. District Court*, 870 P.2d 1250 (Colo. 1994).

After the trial court's bench ruling on the issues litigated at trial in the conservatorship case, the probate court concluded that an independent fiduciary and not Mrs. Bennett should serve as personal representative for Ryan Bennett's probate estate—a separate legal entity from the conservatorship. Mr. Bennett's counsel then, in open court on February 25, 2003, nominated Mr. Steenrod as being a responsible attorney suitable to serve as an independent fiduciary and Petitioner agreed and interposed no objection then or later to Mr. Steenrod's role as fiduciary for her son's probate estate. Mr. Steenrod accepted his appointment as Special Administrator in the decedent's probate estate (not the conservatorship) the day after trial on February 26, 2003.

About three weeks after Mr. Steenrod began his service as Special Administrator for the decedent's probate estate under his letters of appointment, Marc E. Bennett filed a post-trial motion dated March 18, 2003 in the conservatorship litigation. This filing of a post-trial motion by Mr. Bennett apparently led Mr. Steenrod and his counsel, his employee, Melissa Schwartz, to want to enter an appearance in the conservatorship litigation to the extent of offering their opinions to the probate court on how it ought to deal with the newly filed post-trial motion. This task Mr. Steenrod set for himself of offering his opinions about the conservatorship litigation and post-trial aspects of that litigation was outside his February 25, 2003 charter and role as Special Administrator so he sought permission to enter the post-trial motion phase of the conservatorship case over objections filed by Petitioner.

Mr. Steenrod's desire to obtain permission from the probate court to weigh in on the merits of the post-trial phase of the conservatorship litigation was accomplished by his filing on March 31, 2003 of a motion requesting permission to enter into the post-trial conservatorship fray. The Court on April 7, 2003 granted permission for Mr. Steenrod to

weigh in on how he felt about how the probate court ought to rule on the pending post-trial combined motion and gave Mr. Steenrod until July 10, 2003 to include his positions in a written report.

In Colorado, Special Administrator status can be conferred upon a private individual by dint of CRS 15-12-614. This was the authoritative basis upon which Mr. Steenrod, as a lawyer and former probate court magistrate judge, gained his appointment from the probate court in the decedent's probate estate proceedings. Petitioner is not contending in this appeal or below that a person functioning in the role of Special Administrator is somehow a state official nor did she raise objections to Mr. Steenrod's appointment as Special Administrator in her son's probate estate (separate and apart from the conservatorship).

The problem arises in this case because, apart from his role as court appointed Special Administrator for the decedent's probate estate, Mr. Steenrod also held and now holds the title in Colorado of Public Administrator under C.R.S. 15-12-619(1). His employee, Melissa Schwartz who acted as attorney for Mr. Steenrod throughout the process below, held and holds the official state title of Deputy Public Administrator pursuant to C.R.S. 15-12-619(6).

Respondent Robert L Steenrod argued below that he entered the conservatorship litigation, and acted through his counsel, Ms. Schwartz, solely in his role as court appointed Special Administrator and not as the Colorado Public Administrator under C.R.S. 15-12-619(1). He, along with his Deputy Public Administrator, having obtained permission from the Denver Probate Court to do so, thereafter prepared their legal positions weighing in on the legal merits of the post-trial motions pending in the probate court in the conservatorship litigation.

In the meantime, after granting permission to Mr. Steenrod and his Deputy to weigh in by July 10, 2003 on the post-trial motions, instead of timely entering an order granting or denying the post-trial Rule 59/57 combined motions by the last day of its power to do so, May 17, 2003, the trial judge waited an extra 68 days beyond that to enter a ruling granting the relief sought in the March 18, 2003 Rule 59/57 combined post-trial motions. The trial judge waited that period of time (68 days past its 60 day deadline under Rule 59(j)) to obtain the input of the two public officials, the Public Administrator and the Deputy Public Administrator. Their input on how they felt the probate court ought to rule on the post-trial combined motions filed by Mr. Bennett came by way of a report filed by them dated July 10, 2003 with the probate court, which report was filed 58 days **after** the 60 day time frame in Rule 59(j) had elapsed.

The Denver Probate Court waited to rule on Mr. Bennett's combined March 18, 2003 post-trial motions until after it received Mr. Steenrod's July 10, 2003 Report, a written document that primarily discussed his views about how the Rule 59/57 combined motions ought to come out. Relying on that July 10, 2003 Report the probate court then, 14 days after that, on July 24, 2003, summarily *granted* the combined post-trial motions of movant Marc E. Bennett which had been filed by him March 18, 2003. There were no citations to any case law or other authority contained in the July 24, 2003 order.

The July 24, 2003 probate court order granting Mr. Bennett's March 18, 2003 combined post-trial motions held that the central issue raised in those motions—the question of whether the beneficiary designation in the annuity contract entitled Mr. Bennett to have a ruling on that matter included as part of the conservatorship trial judgment—was an issue of law and not one of fact. The July 24, 2003 order thus modified the February 25, 2003 conservatorship trial

judgment holding that as a matter of law the annuity asset was a probate asset and that, as such, Mr. Bennett was entitled as a probate estate beneficiary to one-half of such annuity.

Mrs. Bennett's contention below was that the probate court probably should have just entered an order by May 17, 2003 and dismissed Mr. Bennett's Rule 57 combined motion to the extent it sought a declaratory judgment and the court should have ordered Mr. Bennett to bring his declaratory judgment action as required in Rule 57(m) as a proper pleading/petition instead of as a post-trial motion. Petitioner further contended below that since the probate court did nothing at all as to the pending post-trial motions by its deadline of May 17, 2003, the combined motions and the relief therein requested were 'deemed denied' by operation of law on May 17, 2003 and certain property rights vested in her that day by operation of law.

Petitioner took the position below that the end of the court's subject matter jurisdiction and the deemed denial of the relief requested in the post-trial combined motions for all purposes also started, under Rule 59(k), a 45-day clock running against Mr. Bennett if he disagreed with the deemed denial of this requests to have the trial judgment altered in them way he sought to have it altered in his post-trial combined motion. Given the way the relief sought in the post-trial motions of Mr. Bennett was framed, the deemed denial of the relief therein requested left the annuity contract and its proceeds in the status of 'non-probate' assets vested in and solely payable to the legal representative of Ryan Bennett who was Petitioner.

The Denver Probate Court did not address in its ruling on July 24, 2003 the issue of whether or not the court still had subject matter jurisdiction over the post-trial motions on July 24, 2003 (nor did the Steenrod Report dated

July 10, 2003), obviously concluding that it did have subject matter jurisdiction over the subject annuity's legal status and ownership issues raised in the post-trial combined motions filed on March 18, 2003 by Mr. Bennett. The probate court apparently also concluded on that day (July 24, 2003), notwithstanding the deadlines imposed by Rule 59(j) and 59(k), that it still had power to grant the relief requested in the post-trial combined motions which had, by then, been pending before the court for many months.

V. Argument

A. An Order granting certiorari, reversing the January 26, 2006 Decision/Judgment of the Colorado Court of Appeals is warranted.

Petitioner's rights to procedural and substantive due process of law were violated in this case. The actions of two state officials described in the previous section of this Petition led to a void order being entered against Petitioner primarily because this case was a probate court case and was not a civil case arising in a non-probate setting.

Petitioners who have framed their federal appeals, after they have reached the stage Petitioner has arrived at in her ordeal, as cognizable by federal courts such as this Court and under a 14th amendment theory, have not generally been successful in the past. In situations like Petitioner's situation, litigants' attempts to frame the issues which gave rise to the injustices they believe they suffered during probate court process have previously failed to find Federal standing here or elsewhere in the Federal appeal system for two reasons.

The first reason litigants have not been able to gain federal standing is that there has been over many years a so-called 'probate exception' which greatly limited the ability

of disappointed heirs and others in the state probate process to seek redress of process wrongs in Federal courts. On May 1, 2006 in *Marshall v. Marshall*, 126 S. Ct. 1735, 164 L. Ed. 2d 480, this Court greatly restricted the scope and reach of the so called 'probate exception'.

But for the *Marshall* decision Petitioner would probably not be able to cite authority which could gain her standing to complain here about state officials' violations of her rights to substantive and procedural due process and equal protection of the law because her case arose in a state court probate setting. This also explains the dearth of U.S. Supreme Court cases Petitioner would otherwise cite in support of this Court's issuance of the writ being timely applied for in this Petition.

The second reason why few probate cases involving process injustices suffered by a litigant have not been treated as ones which are federally cognizable (and within the reach of the 14th amendment) is the general requirement of the 14th Amendment that 'state action' must be shown to have caused the process wrong being complained about. In most cases there is simply no state actor as such when a case is in probate court, other than the court itself and it generally enjoys judicial immunity.

Where there are private persons or private institutions functioning in the role that Mr. Steenrod had in this case occupied along with his Deputy, Ms. Schwartz, there is generally no basis for the person wronged by actions of private fiduciaries to claim the fiduciary was acting under color or title of state law or authority.

In contrast to the foregoing situations, this case involved the actions of *two* public officials who caused the wrongs complained of in this appeal. The 'state action' element is met in Petitioner's case and Petitioner therefore

has Federal jurisdictional standing especially after *Marshall*. The two individuals who had status as public officials in the fact profile below derived their status as such by the fact of their office being at all times structured with two divisions. One division served as a private law office receiving appointments from the probate court as Special Administrator and the other division of the same law office (of Mr. Steenrod) was in service to the State of Colorado as the offices of Public Administrator and Deputy Public Administrator.

Beyond the aforementioned impediments to federal cognizability, a breach of state procedural requirements by a state official is not, in and of itself, a violation of the due process clause. *Atencio v. Board of Education*, 658 F.2d 774, 779 (10th Circ. 1981). However, when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights a federal court should intervene in the decisional processes of state institutions. Id at 779 (quoting *Bates v. Spondberg*, 547 F. 2d 325, 329-30 (6th Cir. 1976)).

Atencio is one of the few cases that is even remotely analogous to Petitioner's situation and has even less relevance to this appeal post-*Marshall*. In the situation below the actions of the two officials acting under color of state law went well beyond mere procedural breaches such as those dealt with in *Atencio*. The actions of the two state officials at work against Petitioner's post-trial process rights in the conservatorship litigation, in its post-trial phase, caused the entry of a void order by the probate court presiding in that conservatorship litigation. By their actions Petitioner's property rights which had vested by operation of law on May 17, 2003 were cancelled and destroyed.

Vociferous denials from the two state officials, as evidenced in the papers filed below by the two state officials

involved below, of any conflict of interest, together with their vociferous denials of any dual operational structure of the Steenrod law office, does not establish that there was not a conflict of interest which led to destruction of Petitioner's 14th amendment rights and vested property rights in an insurance annuity.

Nor do those same denials coming from the two public officials below prove there was no dual status structure to the law office in charge in this situation nor do those self-serving denials disprove the fact that the dual role status of the Steenrod law office caused damages to Petitioner's right to receive fair process in the post-trial phase of the conservatorship litigation.

Denying there was and is any special relationship of the Steenrod law office with the probate court by dint of his title as Pubic Administrator simply ignores the dual status of his office. Mr. Steenrod's office was serving as a state office (of Public Administrator) in one division of the same law office and was serving different, non-public sector interests in its other division. It was specifically because of that special status conferred upon him as Public Administrator that Mr. Steenrod's views on the post-trial motions at issue in this appeal were given special preference and consideration by the probate court. His views were assigned greater weight than Petitioner's views.

There was a special deference and preference given to the state officials operating here in the guise of independent fiduciaries, regardless of what title the state officials say themselves they were operating under or not operating under from one day to the next day as it suited their own interests, putting those interests ahead of the beneficiaries' interests in the conservatorship litigation.

Reversing the July 24, 2003 order at issue in this case and remanding the case to restore the Petitioner's property rights (in the insurance annuity proceeds) to the status they had on May 17, 2003, by operation of law, is needed to restore justice to Petitioner and to vindicate her 14th amendment rights to substantive and procedural due process of law and to the equal protection of the law. Petitioner thus far has failed in the lower court process to vindicate her due process and equal protection rights.

Petitioner started off at the close of the trial on February 25, 2003 and the appointment that day of Mr. Steenrod as an independent court appointed fiduciary with the expectancy that Mr. Steenrod would stay within his assigned role and work to protect her interests in her son's probate estate rather than attack her interests and procedural rights in the conservatorship litigation. She is now badly disappointed to have been so naïve about Mr. Steenrod and his plans for the conservatorship litigation.

There was nothing unusual about the post-trial setting in the conservatorship litigation and there was no basis upon which the Court of Appeals or any other Court could decide to treat Petitioner one way in her probate situation and treat other litigants facing identical procedural scenarios in the post-trial phase of their non-probate cases any differently.

When it came to the question of her constitutional rights to fair process in the post-trial phase of the conservatorship litigation and her reasonable expectation that Mr. Steenrod would not use his law office and role as Special Administrator (in her son's separate probate estate matter) to do her harm in the conservatorship litigation, Petitioner's expectations were dashed. Expecting to have an independent fiduciary and his law office conduct himself and itself in a way consistent with their duties of loyalty and impartiality at all times, instead, led to a circumstance where

Mr. Steenrod used his office to collect extra fees for legal work and administrative work in the conservatorship litigation and that same work led to the demolition of Petitioner's vested property rights, rights which had vested as a matter of law on May 17, 2003.

Mr. Steenrod and his office abused their positions of trust to advance legal positions he felt he had a right to articulate in his July 10, 2003 Report to the probate court (as to the pending post-trial issues in the conservatorship litigation). Petitioner of course confronted Mr. Steenrod below with these perceived conflicts of interests and the perceptions Petitioner held about the lack of responsiveness on his part or his office's part to her concerns about the failure of his office to carry out its fiduciary duties to her in a fair and impartial way. Instead of any responsiveness or action in relation to Petitioner's concerns on those matters, Petitioner found little more than a stonewall or a black hole or something at the Steenrod law office in the place she expected to find concern about her rights and interests in property. At his office she had expected to find a fiduciary's concerns for protecting her constitutional rights to fair process, equal protection and due process of law.

This case provides an opportunity for this Court to examine, in light of *Marshall*, whether or not relationships between public offices created to serve probate courts, as here, are constitutionally suspect in some situations like this one because of the effect, as here, such 'cozy' relationships—between the probate court and those public offices and the owners of those public offices created to serve the court—have on litigants' due process rights in probate court litigation.

In this case the order which was attacked by Petitioner below as void (entered out of time, the issuing court lacking subject matter jurisdiction over the issues by

then non-justiciable even for appeal purposes after July 1, 2003) is the July 24, 2003 order which was entered 68 days out of time and 24 days after the appeal deadlines had expired under Rule 59(j) and Rule 59(k).

Intervention by a public official in circumstances such as those below does not, under Colorado or any other law known to Petitioner or her counsel, extend subject matter jurisdiction of the Denver Probate Court in a post-trial motion setting such as that featured in the factual profile of this case.

The Colorado Court of Appeals on January 26, 2006 affirmed the July 24, 2003 order of the Denver Probate Court. The Court of Appeals apparently agreed with the lower court that because the underlying issues presented in the Rule 59/57 post-trial combined motions filed by Marc Bennett presented ones of law, and not ones of fact or ones of mixed law and fact, it was therefore somehow not necessary in the circumstances, even in light of Rule 59(j), for the probate court to examine the threshold question of whether the probate court had subject matter jurisdiction or not at the time it reached and decided the merits of the post-trial motions which had been before it for so many months after trial.

In affirming the July 24, 2003 order of the Denver Probate Court, the Colorado Court of Appeals on January 26, 2006 sided not only with the trial judge but also sided with the two public officials whose actions caused the trial judge to post-pone her ruling to a date 68 days *after* her subject matter jurisdiction had expired as to the motions which had been before the court since March 18, 2003.

The process wrongs suffered by Petitioner below were further compounded by the process used by the Colorado Court of Appeals to dispose of Petitioner's challenges to the power of the Denver Probate Court. The

Court of Appeals in its act of affirming the July 24, 2003 ruling on the post-trial combined motions decided, in essence, to cloak its ruling and rationale offered in defense of its ruling, in the procedural wrap of Colorado Appellate Rule 35(f). C.A.R. 35(f) opinions are used in situations where the court feels that an unpublished ruling should issue. Such 35(f) decisions cannot be cited as authority, are unpublished and bind only the parties before the Court. When Rule 35(f) is used in the manner it was used here, it further ensures there will be no meaningful opportunity for the litigant to have any further review state court review of the unpublished opinion.

Even if a party adversely affected by a Rule 35(f) opinion files a timely petition for certiorari with the Colorado State Supreme Court, the state Supreme Court seldom, if ever, even looks at Rule 35(f) opinions in civil cases. The ability to file a petition for writ of certiorari with the state supreme court and pay a fee to have one's case heard there are essentially pro-forma entitlements which are empty of any real vitality if the measure of vitality is whether the litigant is actually going to get the higher court to even look behind a 35(f) decision of the Colorado Court of Appeals to test its validity and authoritative foundations.

35(f) decisions emanating from the Colorado Court of Appeals are essentially ineligible for certiorari review by the Colorado Supreme Court and that is apparently why 35(f) opinions are so frequently issued in civil cases, or, Petitioner contends, in cases where troublesome issues are set before the Court for resolution. Justices of the Colorado State Supreme Court have publicly spoken about this topic in tape-recorded public statements such as in their public statements made at taped professional seminars for C.L.E. (Continuing Legal Education) conferences as occurred at a recent C.L.E. conference held on appellate court subjects in the year 2005. Several Colorado Supreme Court justices in their remarks at

that conference acknowledged that it was virtually impossible to have a petition for writ of certiorari granted when a 35(f) opinion from the Colorado Court of Appeals in a civil case is being challenged by a litigant.

Petitioner wishes to emphasize she is not complaining about the use by the lower appeals court of C.A.R. 35(f) procedures *per se*. It is the *overuse* of this rule by the appeals court in probate cases to avoid its role, as being a check on the district courts below that is the crux of Petitioner's complaint as to this aspect of the injustice she suffered in the appeal process below.

The violation of Petitioner's 14th amendment rights began with actions of state officials, later validated by the trial court, and such violations were then compounded by the actions of the appeal court process in Colorado in not providing to Petitioner an objective review. Instead of hearing the actual issues raised in Petitioner's Notice of Appeal and then articulating an authoritative rationale for its holdings, the Colorado Court of Appeals merely took sides with the State of Colorado officials whose actions set into motion the chain of events which resulted in a void order being entered by the trial court which is now being enforced against the Petitioner below.

Petitioner could not know until July 24, 2003 that the probate court sitting in the conservatorship litigation matter was going to grant the March 18, 2003 post-trial combined motions filed by Respondent Marc E. Bennett. The validation of the lower court decision to extend its own jurisdiction an extra 68 days and placing that appeal decision behind an unpublished opinion under Rule 35(f) in fact protected and validated the wrongful actions of the two state officials in this case. The intervention by the public officials in the conservators in the post-trial proceedings in the

conservatorship litigation caused Petitioner's 14th amendment rights to be violated.

The public officials, Mr. Steenrod on his own behalf and/or for his Deputy Public Administrator, will assert once again here, it is anticipated as they did below, that their actions in relation to the conservatorship post-trial proceedings were authorized by the Denver Probate Court and furthermore, Mr. Steenrod will likely assert, he was acting solely as a private, court appointed fiduciary in the decedent's probate estate (a separate legal entity).

This appeal to this Court is ***not*** about the role of Mr. Steenrod and his Deputy Public Administrator in their actions in relation to the decedent's probate estate or about Mr. Steenrod's law office's appointment to the role of Special Administrator in the decedent's probate estate. Petitioner anticipates Mr. Steenrod and his Deputy will argue again here that there is one entity even though there were two distinct entities, the conservatorship and decedent's probate estate.

Mr. Steenrod will argue, as he did below, that, for purposes of the issues raised below, the two entities somehow blend into one seamless continuum. His arguments about this are false. *Petitioner's appeal is about the role of the two public officials in their actions in the conservatorship litigation* and not about the decedent's probate estate and its related administration.

Mr. Steenrod and his deputy were each wearing at least two hats at all times below and even more than that number of hats at other times in this litigation. The damages complained of would not be remedied by his later removal after July 24, 2003 as suggested by the Colorado Court of Appeals in its decision. The reason this is true is that Petitioner's rights which were irrevocably violated were

damages that had already been done by July 24, 2003, which damages Petitioner could not know until July 24, 2003, which was 24 days after her right to appeal the alteration on July 24, 2003 of the February 25, 2003 trial judgment had already expired.

Petitioner below unsuccessfully attempted to have the July 24, 2003 order set aside by higher appeal courts as a void order when the lower court refused to consider the subject matter jurisdiction issue when counsel raised it with the probate judge. The appeal court process sided with the public officials at the expense of the 14th amendment rights of Petitioner. The probate court gave overly wide discretion to the two public officials apparently relying on them to provide the Court with input on what it ought to do in relation to the post-trial motions which were pending after the conservatorship trial.

The intervention of the two public officials in the conservatorship litigation as described herein created an insurmountable obstacle to Petitioner's quest for fair process in the important post-trial phase of the conservatorship case. It was never squared up to the satisfaction of Petitioner how the two public officials were able to discharge their dual, inherently conflicted and inherently incompatible roles in a way compatible with their contemporaneous fiduciary duties to Petitioner, including the duty to forbear from entering previous litigation they were not a part of on one side of that litigation where the same intervenor had duties of impartiality to both litigants. The two public officials worked vigorously below to defend their dual roles and to deny any conflict of interest created thereby and so far have succeeded in having the dual roles they acted out below validated by Colorado courts.

The situation below is not unlike a situation wherein the same lawyer acts both as a commission broker in a real

estate transaction while also serving in the role of counsel to one of the parties in the same real estate transaction. Except the situation here it is much worse than in that example because the two roles served by Mr. Steenrod and his law office were even more incompatible one to the other. He was supposed to be serving in only one role as that of an independent private fiduciary with the title of Special Administrator for the decedent's probate estate. In his other role (as Public Administrator) he apparently was on some kind of a crusade for the state of Colorado in the conservatorship litigation, or for the ex-husband, Mr. Marc E. Bennett, or for his own interest in collecting extra fees, or working on behalf of who knows who else. He certainly was not working in the best interests of Petitioner, of that much she is absolutely sure.

In its January 26, 2006 decision the Colorado Court of Appeals criticized Petitioner for not seeking to remove Mr. Steenrod as Special Administrator of the decedent's probate estate if that was her complaint. However, removal of Mr. Steenrod as Special Administrator in the decedent's probate estate as suggested by the Colorado Court of Appeals would not have restored Petitioner's rights as they existed on May 17, 2003 and on July 1, 2003, which rights were irrevocably, but for this appeal, demolished on July 24, 2003.

The probate court used Mr. Steenrod's July 10, 2003 Report as a basis upon which to grant the post-trial motion declaring as a mater of law the insurance was a probate asset and, as such, that asset belonged 50% to the movant, Mr. Marc Bennett (who was a 50% beneficiary of probate assets. It was always Mrs. Bennett's contention below that there should have been process on the question of whether **or not** the insurance proceeds were a probate asset. The answer to the status of the insurance proceeds' status as a probate asset came on May 17, 20[illegible] by operation of law and not on July

24, 2003 the date of the void order entered 68 days out of time was the crux of the appeal litigation below.

It was the intervention on March 31, 2003 of the Public Administer and his Deputy in relation to the conservatorship trial, which ended on February 25, 2003 that was complained about below. However the Court of Appeal re-framed the issues presented in the Notice of Appeal timely filed by Petitioner challenging the July 24, 2003 lower court order as void. In other words the Colorado Court of Appeals took up issues it felt it wanted to opine about while side stepping the actual issues presented in the Notice of Appeal. After re-framing Petitioner's issues, characterizing the case in a pigeonhole fashion, and the Court of Appeals thereafter reached its dispositive conclusions and placed them behind a Rule 35(f) judgment.

Overuse of its C.A.R. 35(f) procedure, while serving as an expedient short cut when troublesome issues such as subject matter jurisdiction and void orders arise in a probate context, does nothing to advance justice nor does it protect in a fair and equal way the property interests under the 14th amendment of the litigant whose interests are before the court.

Petitioner feels that the overuse of CAR 35(f) procedures to restrict access to higher courts for civil litigants chokes away a civil litigant's opportunity for meaningful redress of process wrongs they are complaining about and which have been suffered in a trial or, as here, in the post-trial phase of a case. Using a 35(f) procedure in the procedural and legal setting of this probate case avoided having the appeals court articulate a legal foundation supporting its decision to allow the probate court to expand her jurisdiction by an extra 68 days. The use of the 35(f) tool at its disposal was another structural process injustice suffered by Petitioner in her situation below mainly because

her case was a probate case where public officials' voices had a profound effect on the outcome in civil litigation in which the state official had not even participated at any stage of that litigation.

That state officials generally tighten their jaws, stiffen their necks and further harden their already fairly hardened hearts when confronted with conflicts of interest and complaints about adverse side effects caused by their conflicted roles, is not new. In this case however, the role of the public officials was more pronounced and insidious than in many other situations involving public officials who possess conflicts of interest because a law office was used by the state officials as the center of the operations structured at its very foundation with the dual purposes of having the law office serving both in an official public role and also a private role, usually in separate cases. Even then the dual operation structure and dual loyalties of Mr. Steenrod need not have clashed with Petitioner's rights except that Mr. Steenrod, when he entered the conservatorship litigation in its post-trial phase, put on both of his hats and operated out of both divisions of his office in this case.

Once you start the state official's ball rolling down the hill it is virtually impossible to stop it. It (the state action and the presumption of its validity) picks up momentum as it moves along in its destructive path and the jaws of the state officials, as here, typically become tighter, their necks stiffer and their hearts more hardened even as the 14th amendment rights of the harmed litigant roll further and further downhill.

B. Under the 14th Amendment, the January 26, 2006 Decision and Judgment of the Colorado Court of Appeals was incorrect to sidestep the issue of whether the trial judge could grant unto herself an extra 68 days of subject matter jurisdiction not sanctioned in the applicable Colorado Rules

of Civil Procedure and not otherwise sanctioned under Colorado law.

Throughout the ordeal below the two state officials constantly put pressure on the Petitioner to drop her appeals to the Colorado Court of Appeals and later to the Colorado State Supreme Court. The officials twice filed motions, once in the year 2004 and once in 2005, seeking to have Petitioner's appeal dismissed at the Colorado Court of Appeals.

This case tests whether state officials can put their thumbs on scales of justice and cause a citizen's rights guaranteed under the 14th amendment to be reduced to mere empty abstractions that only theoretically used to belong to the litigant. The state action here by the two state officials emptied Petitioner's expectation of a fair process in the post-trial phase of the conservatorship litigation and replaced Petitioner's basket of expectations in that regard with hollow, self-serving assertions made by a law office and its principals, Mr. Steenrod and his deputy.

The two state officials, by taking up positions against Petitioner's interests in the private litigation between the two parties in the conservatorship proceedings below, put their thumbs on the scales of justice, and that fact led to the lower court's entering a binding order adversely affecting Petitioner 68 days out of time. Beyond this, the pecuniary benefit to the two public officials of their state action was that they collected extra fees by dint of their intervention in the conservatorship litigation they would otherwise not have been paid out of the probate estate.

As a consequence of the state actions by the two state officials below, as things stand now, Petitioner gets, for her trouble in this situation, to carry away from her conservatorship litigation experience a basket or bucket

holding now empty, abstract and self-serving assertions from a law office, the Steenrod law office, instead of carrying away vested property rights that she thought she once held and that were supposed to be, she thought, protected under her 14th amendment rights to procedural and substantive due process of law and the equal protection of the law. There seems to be an attitude held by professional administrators and state officials like Mr. Steenrod that because it is a probate case unearned monies are, in a way, up for grabs to whoever can grab the money whether by hook or by crook, or, as here, by what Petitioner considers crooked means. Probate litigant's vested rights in 'unearned wealth' are taken less seriously than other property interests which have vested in persons in non-probate settings.

There is also a kind of 'hiding' from the truth going on situations like that described here. This perhaps stems from the 'coziness' of relationships that have developed over time between certain law firms and the probate court in situations like this one. With the probate exception working historically in their favor, little scrutiny has been given to these often cozy and convenient relationships (convenient for the court and the professional administrators seeking court appointments). But those same relationships between law firms and probate courts may sometimes, as here, adversely affect a probate litigant's rights to due process and equal protection.

There is also a kind of court sanctioned hiding from the truth in probate cases when an issue of the court's power to rule on post-trial motions comes up every day in non-probate cases, and is dealt with one way there, and when it is dealt with in an entirely different way *because* the case is a probate case. The Colorado Court of Appeals successfully sidestepped these troublesome issues by simply 'burying' behind a 35(f) decision their apparent bias in favor of public officials in probate cases after the probate court had ruled in

favor of the state official and against a beneficiary in a given probate case such as the one featured in this appeal.

Rule 35(f) type opinions in probate cases have a kind of additional protection from further scrutiny by a higher court of appeals, prior to *Marshall*, due to the so called 'probate exception'. *Marshall* applied in the context of this case by this Court will hopefully, if a writ issues, have a therapeutic effect of shining some light into places where hiding from the truth may be going in probate processes that would not be tolerated if the same circumstances arose in a non-probate case setting.

The process injustice suffered by Petitioner in the probate court continued in the appeal process because great weight was given to the lower court orders which were, in turn, pegged to the legal analysis of the two public officials. The recommendations and advice of the state officials were heavily relied upon by the probate court (and by the Court of Appeals) to the profound detriment of the property interests of Petitioner. The Appeals Court essentially rubber-stamped the process initiated by Mr. Steenrod and his deputy, later validated by the Denver Probate Court.

It is nearly impossible for a litigant such as Petitioner to tip the scales of justice back to a neutral level after state officials in situations like the one in this case have already put their thumb down on the scales of justice and essentially rigged the case against Petitioner in the critical post-trial phase of the conservatorship trial proceedings.

The 14th amendment creates important 'rights' and not just 'privileges' easily revocable by capricious actions of state officials who decide one day to intervene in private litigation. Results of the kind experienced below in her case leave litigants such as Petitioner with the impression their vested property rights are easily revocable 'privileges'

because actions of state officials can so easily, as here, set aside those vested property rights.

What happened below in her case leaves litigants in circumstances like Petitioner's to make their complaints here or simply live the rest of their lives among the walking wounded adversely affected by state action by state officials acting under color of state law. If this petition is denied, Petitioner will join the many victims of state action, the many walking wounded who routinely believe the lofty, idealized principles set out in the Federal constitution are for somebody else or are quaint but otherwise empty abstractions that don't apply to real people who interface with the state judicial processes and state government process.

Petitioner will feel, if she receives no justice here, that her process rights and vested property interests are easily disturbed by the actions undertaken by officials acting under color of state law and which actions are validated by a court order. Petitioner will then know there is no remedy for process wrongs of the type she experienced below, either from above or below the site of the process injustice she experienced in her situation.

State budgets constraints which impair the ability of the justice process to look more closely at an individual civil litigant's case is sometime offered by the justices speaking about such subjects publicly, as an excuse for why civil litigants are often given, what Petitioner considers, a short shrift by the judiciary. The overuse of the CAR 35(f) tool for disposition of a case leads to a kind balancing of the appeal administration books on the backs of the civil litigants, to the benefit of convicted criminals and their appeals.

VI. Conclusion

Petitioner seeks here what she always sought below and that was the fair process due her under the facts and circumstances of the conservatorship litigation described in this Petition and guaranteed by federal and state law. She seeks here, as below, consistent application of the rules of the probate court so that she is not discriminated against because the wrongs she complains of arose in a probate context instead of another type of civil proceeding. She seeks justice free of improper intervention by state officials into the process of fair administration of justice.

Petitioner also seeks here nothing more than what the law and the applicable rules of civil rules required in the facts and circumstances and procedural setting of the case below. Petitioner desires to have the ultimate outcome of the legal issues raised in the post-trial motion filed against her by Mr. Bennett, the ex-husband, be based on the law, the record, the rules and the calendar applicable to her case and not have the result pegged to the wishes of intervening public officials bent on rigging the outcome of the litigation against her and favoring her ex-husband.

Petitioner here seeks redress from the bias the process below displayed, especially the appellate process, by its favoring of legal positions of Mr. Steenrod and his deputy, the public officials, at the expense of Petitioner's

property interests protected under the 14th amendment from process abuses of the kind which occurred below.

Dated this 3rd day of August, 2006

LAW OFFICES OF THEODORE COATES, P.C.

s/ Theodore Coates

Theodore Coates, Esq.
Counsel for Petitioner
7887 East Belleview Avenue Suite 1100
Englewood, Colorado 80111
(303) 738-9600

SUPREME COURT, STATE OF COLORADO
TWO EAST 14th AVENUE
DENVER, COLORADO 80203 CASE NO. 06SC148

CERTIORARI TO THE COURT OF APPEALS, 04CA0396
PROBATE COURT, CITY & COUNTY OF DENVER,
86PR209 & 02PR1175

In the Matter of the Estate of Ryan Edward Bennett, deceased.

Petitioner:
KRISTI S. BENNETT,

v.

Respondents:
MARC E. BENNETT and ROBERT I. STEENROD, JR., Special Administrator of the Estate of Ryan Edward Bennett, deceased.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, MAY 8, 2006.

[COURT SEAL]

Copies mailed via the State's Mail Services Division on 05/08/06. MLK

Theodore P. Coates
Law Offices of Theodore Coates, P.C.
7887 E. Belleview Ave., #1100
Englewood, CO 80111

Melissa Schwartz
R.L. Steenrod, Jr.& Assocsiates
Mattie Silks House
2009 Market St.
Denver, 80205

Jennifer I. Holt
1660 Lincoln St., Ste. 2525
Denver, CO 80264

Clerk of the Probate Court
City & County Building
1437 Bannock, Rm 230
Denver, CO 80202

Clerk of the Court
Colorado Court of Appeals

Honorable C. Jean Stewart
Probate Court Judge

COLORADO COUIRT OF APPEALS

Court of Appeals No.: 04CA0396
City and County of Denver Probate Court Nos.
86PR209 & 02PR1175
Honorable C. Jean Stewart, Judge

In the Matter of the Estate of Ryan Edward Bennett, Deceased.

Kristi S. Bennett,
Petitioner-Appellant,

v.

Marc E. Bennett and Robert L. Steenrod, Jr.,
Special Administrator of the Estate of Ryan Edward Bennett,
Deceased,
Appellees.

ORDER AFFIRMED

Division IV
Opinion by: JUDGE VOGT
Davidson, C.J., and Casebolt, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: January 26, 2006

Law Offices of Theodore Coates, P.C., Theodore P. Coates,
Englewood, Colorado, for Petitioner-Appellant

Jennifer I. Holt, Denver, Colorado, for Appellee Marc E. Bennett

R.L. Steenrod, Jr. & Associates, P.C., Melissa R. Schwartz,
R.L. Steenrod, Jr., Denver, Colorado, for Appellee Robert L.
Steenrod, Jr.

Kristi S. Bennett (mother) appeals the probate court's order, entered in two related probate court proceedings, awarding attorney fees to Marc E. Bennett (father). We affirm.

The parties' son, Ryan Edward Bennett, was severely disabled as a result of injuries he sustained at birth. After the parties divorced, mother was appointed sole conservator for Ryan until his death in November 2001. She was then appointed personal representative of Ryan's probate estate. At the time of the latter appointment, the probate court directed that all assets collected by mother since Ryan's death – including certain annuity payments made pursuant to a 1986 settlement with Ryan's medical providers – were to be part of the probate estate. Mother did not object.

Before Ryan died, father had filed a petition for an accounting, challenging various expenditures of the conservatorship. At a hearing on February 25, 2003, to address father's contentions, the probate court learned that mother was claiming that the annuity payments were not part of the probate estate but were instead payable to her alone based on her status as Ryan's conservator. The court thereupon revoked mother's appointment and appointed Robert L. Steenrod, Jr., as special administrator of the estate, giving him the power and authority of a personal representative. It also dismissed father's objections to the final accounting in the conservatorship proceeding.

Mother filed a motion in both cases seeking relief from the court's February 25 order pursuant to C.R.C.P. 60(b). She stated that her belief that the annuity payments were not a probate asset was an "honest mistake" that warranted modification of the order on the ground of excusable neglect. She also suggested that "the issue about the ownership of the [annuity] could be framed as one set for

declaratory judgment or other determination by the Court."

Father then filed a "Combined Response to Rule 60 Motion and Motion for Rule 59 Clarification and/or Rule 57 Declaratory Judgment and Attorney's Fees." In addition to requesting clarification of the probate court's ruling on his request for an accounting, father responded to mother's contentions on the annuity issue by asking the court to declare, pursuant to C.R.C.P. 57, that the annuity payments received after Ryan's death were "equally for the benefit of and payable to" him and mother, as Ryan's legal heirs.

The special administrator then filed a petition for instructions concerning his authority to use the annuity payments to pay expenses of the estate and his role in determining ownership of the annuity. On April 7, 2003, the probate court ordered the special administrator to (1) use the annuity payments to pay the estate's obligations until ownership of the payments could be determined, and (2) review the conservator's accountings and disbursements and determine what was properly to be included within the probate estate. The court further ordered that all matters in the two cases be held in abeyance pending receipt of the special administrator's report, which was due by July 10, 2003.

Following receipt of that report, on July 24, 2003, the trial court entered an order (1) determining that the 1986 settlement agreement with the providers unambiguously made the annuity payable to Ryan's "legal representative, devisees, heirs, or estate" after his death, and that mother's argument that she alone was entitled to the annuity was "entirely baseless, groundless, and frivolous"; (2) assessing attorney fees pursuant to § 13-17-102, C.R.S. 2005, against mother and her counsel, based both on mother's argument and on her having misled the court into appointing her as a

fiduciary without disclosing her argument; (3) setting outstanding accounting issues for hearing in January 2004, thereby rendering moot father's motion for C.R.C.P. 59 clarification; and (4) directing the parties to participate in mandatory mediation and to prepare a trial management order.

Mother filed a timely notice of appeal of the July 24 order, but the appeal was dismissed for lack of a final judgment. On January 15, 2004, the probate court entered an order directing mother and her counsel to pay father's attorney fees in the amount of $1,592.45. This appeal followed.

I.

We must initially determine which issues are properly before us for review.

Under § 15-10-308, C.R.S. 2005, and C.A.R. 1 (a)(1), only final judgments of probate courts are reviewable on appeal. *In re Estate of Franchs*, 722 P.2d 422 (Colo. App. 1986).

Whether a probate court order is deemed final for purposes of review is determined on a case-by-case basis. The test for determining finality is whether an order disposes of and is conclusive of the controverted claim for which that part of the proceeding was brought. If additional hearings on the same issue are not required, the order is final and appealable even though other aspects of the administration of the estate remain for disposition. *In re Estate of Binford v. Gibson,* 839 P.2d 508 (Colo. App. 1992).

A probate court's order formally appointing a special administrator with the power of a general personal

representative is final and appealable. *In re Estate of Franchs, supra.*

C.A.R. 4(a) requires that a notice of appeal be filed within forty-five days of the date of the judgment or order from which the appeal is taken, although the forty-five-day period may be extended for a period not to exceed thirty days upon a showing of excusable neglect. If a notice of appeal is not filed within the applicable time limit, this court lacks jurisdiction to consider the appeal. *In re Estate of Binford v. Gibson, supra.*

A.

Applying these standards here, we conclude that we lack jurisdiction to address mother's challenges to the probate court's February and April 2003 orders appointing the special administrator and directing him to address ownership of the annuity payments. These orders were final and appealable, but mother did not file a notice of appeal within the applicable time limit. Further, mother's C.R.C.P. 60 motion did not toll the time for filing an appeal challenging the appointment of the special administrator. *See In re Marriage of Buck,* 60 P.3d 788 (Colo. App. 2002).

B.

We likewise do not address the parties' contentions regarding the probate court's handling of the accounting issues. The record includes no final order or judgment as to the accounting issues from which an appeal could be taken. Further, because he did not cross-appeal, father would in any event not be entitled to consideration of his request that we direct the probate court to "include in any later trial on remand the accountings of [mother] from 1997 forward." *See Blocker Exploration Co. v. Frontier Exploration, Inc.,* 740

P.2d 983 (Colo. 1987)(appellee must generally file cross-appeal to obtain appellate review of alleged trial court error); *Western Surety Co. v. Smith,* 914 P.2d 451 (Colo. App. 1995)(where defendants did not cross-appeal, appellate court would not consider issues that defendants wanted court to address for guidance on remand).

C.

We do, however, address mother's contentions regarding the July 24, 2003, order, to the extent those contentions challenge the basis for the probate court's award of attorney fees.

Mother previously sought to appeal the July 24 order, but a division of this court dismissed her appeal for lack of a final judgment. The July 24 order was not final, because, although it determined that father was entitled to attorney fees pursuant to § 13-17-102, the order did not determine the amount of the fee award. *See M Life Insurance Co. v. Sapers & Wallack Insurance Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001)(award granting attorney fees but not determining amount is not a final judgment), *overruled on other grounds by Pueblo Bancorporation v. Lindoe, Inc.,* 63 P.3d 353 (Colo. 2003).

The amount of attorney fees was the subject of the probate court's January 15, 2004, order, and mother filed a timely notice of appeal from that order. Thus, the attorney fee issue, including the basis for the fee award, is now properly before us for review. In conducting that review, we must necessarily consider whether mother's argument regarding the annuity lacked substantial justification, as the probate court found. We must also address mother's contention that the July 24 order assessing fees was void for lack of jurisdiction.

II.

Turning to the merits of mother's contentions, we conclude that the probate court did not lack jurisdiction to enter its July 24 order, and that the court did not abuse its discretion in assessing fees under § 13-17-102 based on mother's annuity argument.

A.

Mother contends that the probate court's July 24 order was void because it addressed issues that "had already been litigated in the February 25, 2003 trial," and also because the issues it addressed were "nonjusticiable" by July 24, 2003. We disagree.

Contrary to mother's contention, the annuity issue on which the attorney fee award was based had not previously been litigated. As noted above, mother's position regarding the annuity was first brought to the probate court's attention at the February 25, 2003, hearing. The probate court removed mother as personal representative but did not decide who was entitled to the annuity. Mother reasserted her position in her March 6, 2003, C.R.C.P. 60 motion and suggested that the issue could be "framed as one set for declaratory judgment or other determination by the Court." Father then filed a request for such a declaratory judgment along with his response to mother's C.R.C.P. 60 motion and his request for clarification pursuant to C.R.C.P. 59.

Mother cites no authority, and we are aware of none, precluding father from combining his motions in the circumstances presented here. The combined filing was not an improper attempt to amend a complaint, as in *People ex rel. Woodard v. Mountain States Telephone & Telegraph Co.*, 739 P.2d 850 (Colo. 1987), on which mother relies;

rather, it was a response to an issue raised late in the proceedings by mother, and it sought a remedy suggested by mother herself in her C.R.C.P. 60 motion. In these circumstances, the probate court did not err in concluding that the matter was "properly pled," and in ruling on the requested relief. Although mother complains that the ruling deprived her of her right to have a jury determine the annuity issue, she would not have had the right to a jury trial on this issue in any event. *See Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993)(suit by heirs to determine entitlement to estate assets was equitable in nature; thus, plaintiffs were not entitled to jury trial on their claim for declaratory judgment).

Further, although C.R.C.P. 59 motions are deemed denied if the trial court does not rule on them within sixty days, there is no similar time limit for ruling on motions pursuant to C.R.C.P. 57 or 60. A trial court's loss of jurisdiction to rule on a C.R.C.P. 59 motion does not divest the court of jurisdiction to rule on other motions. *See De Avila v. Estate of DeHerrera,* 75 P.3d 1144 (Colo. App. 2003)(trial court lost jurisdiction to rule on C.R.C.P. 59 motion after sixty-day period elapsed; however, divestiture of jurisdiction under C.R.C.P. 59 did not preclude court from considering same issue raised under C.R.C.P. 60). Thus, even if we assume the probate court lacked jurisdiction on July 24 to rule on father's C.R.C.P. 59 motion, that jurisdictional defect did not deprive the court of jurisdiction to rule on the annuity issue raised in mother's C.R.C.P. 60 motion and in father's C.R.C.P. 57 motion for declaratory judgment.

B.

We perceive no abuse of discretion in the probate court's decision to assess attorney fees pursuant to § 13-17-102.

Section 13- 17-102(4), C.R.S. 2005, states that a court shall assess attorney fees if it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification. "Lacked substantial justification" means "substantially frivolous, substantially groundless, or substantially vexatious." Additionally, as relevant here, § 13-17-102(4) provides for an award of fees if the court finds that an attorney or party "unnecessarily expanded the proceeding by other improper conduct."

Whether a claim or defense lacks substantial justification is a question of fact for the trial court, whose determination will not be disturbed on review if it is supported by the record. *Mitchell v. Ryder,* 104 P.3d 316 (Colo. App. 2004); *see generally Western United Realty, Inc. v. Isaacs,* 679 P.2d 1063 (Colo. 1984).

Here, the probate court's award was based in part on the court's determination that mother and her counsel had failed to disclose their argument until the court had been "misled" into appointing mother as a fiduciary. That finding is supported by the record, and it would, without more, support an attorney fee award. *See Western United Realty, Inc. v. Isaacs, supra,* 679 P.2d at 1069 (noting that the "rationale for awarding attorney fees is even stronger" where party or counsel acted vexatiously or in bad faith); *Mitchell v. Ryder, supra*, 104 P.3d at 321 ("vexatious" claim is one brought or maintained in bad faith, and may be based on conduct that is "disrespectful of truth and accuracy").

Further, given mother's failure to present a rational argument in support of her proposed construction of the settlement agreement, the probate court could also conclude that her argument was frivolous. *See Western United Realty, Inc. v. Isaacs, supra* (claim is frivolous if not supported by rational argument).

The settlement agreement provided, in paragraph 3(c), that the physician's insurer would pay the estate of Ryan Bennett $8,000 per month for life, beginning April 1, 1986, with a built in annual increase. The agreement continued:

> 4. Should Ryan Bennett die before April 1, 2016:
>
> a. The payments due under paragraph 3.c of this Agreement shall be payable to his legal representative, devisees, heirs, or estate until March 1, 2016, after which the obligation to make future payments will terminate.

The disputed annuity payments here were those made after Ryan's death, pursuant to paragraph 4(a). Mother contended in the probate court that she was entitled to all these payments based on her status as Ryan's conservator and, as such, his "legal representative." *See Bartlett v. Elgin,* 973 P.2d 694 (Colo. App. 1998)(noting that definition of "legal representative" under § 13-81-101(2), C.R.S. 2005, includes "conservator"), *aff'd,* 994 P.2d 411 (Colo. 1999). However, the meaning of "legal representative" in paragraph 4(a) must be determined with reference to the other terms in the phrase of which it is a part. *See Winter v. People,* __P.3d__ (Colo. No. 04SC654, Jan. 9, 2006)(under ejusdem generis principle, word or phrase must be interpreted to apply only to those things that share the characteristics of items listed together with it); *First Christian Assembly of God v. City & County of Denver*, 122 P.3d 1089 (Colo. App. 2005). The entities and individuals enumerated in paragraph 4(a) are those entitled to succeed to Ryan's rights under the agreement after his death. "Legal representative" in this context thus does not refer to one who may have had that

status during Ryan's lifetime. Rather, paragraph 4(a) of the settlement agreement clearly contemplates that the recipients of the annuity payments after Ryan's death will be determined based on their status following his death, not on any status they may have held during his lifetime.

In sum, we agree with the probate court that the settlement agreement unambiguously does not state that mother is entitled to the annuity to the exclusion of the other parties ("legal representative, devisees, heirs, or estate") identified in paragraph 4(a). The probate code provisions cited by mother on appeal do not support a contrary conclusion. Further, because the agreement is not ambiguous, mother would not be entitled to present the extrinsic evidence to which she refers for the first time in her reply brief on appeal. *See Pepcol Manufacturing Co. v. Denver Union Corp.*, 687 P.2d 1310 (Colo. 1984).

The order is affirmed.

CHIEF JUDGE DAVIDSON and JUDGE CASEBOLT concur.